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IN THE
Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, *ET AL.*,
Petitioners,

and

FEDERAL COMMUNICATIONS COMMISSION, AND
THE UNITED STATES OF AMERICA
Petitioners,

v.

GULF POWER, *ET AL.*,
Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* CONSUMERS UNION, *ET AL.*, IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*

Consumers Union, Consumer Federation of America, United Church of Christ, Office of Communication, Inc., and Center for Media Education [hereinafter "CU, *et al.*," or "citizen *amici*"] file this *amicus curiae* brief pursuant to Rule 37.3(a) of the Supreme Court Rules.[1] Copies of the parties' written consent and this brief are being filed simultaneously with the Clerk.

CU, *et al.*, seek to protect the current open, free nature of the Internet. CU, *et al.*, collectively represent approximately 40 million citizens and residents of the United States. CU, *et al.*, represent the interests of Internet users. These organizations seek to promote access to diverse information sources in the media, pursue competition that will reduce prices and increase product quality, and enhance citizen access to civic information that will enable them to participate more fully in this Nation's democratic institutions.

Citizen *amici* believe that the business model currently utilized by the cable television industry to offer high speed Internet access will destroy the free nature of the Internet. Citizen *amici* have vigorously pursued legal and regulatory efforts to prevent this from happening.[2]

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[1] Pursuant to this Court's Rule 37.6, CU, *et al.*, and CU, *et al.*'s counsel certify that no counsel for a party authored this brief in whole or in part and no person or entity other than CU, *et al.*, and CU, *et al.*'s counsel made any monetary contribution to the preparation of this brief.

[2] One or more of the four organizations submitting this brief have, *inter alia*, submitted *amicus curiae* briefs before the

Motivating CU , *et al.*, to submit this brief is CU, *et al.*'s concern that extraordinarily negative consequences will flow from any decision of this Court that Internet access delivered over cable television infrastructure meets the statutory definition of "cable service." CU, *et al.*, recognize that it is quite possible that this Court may conclude that it is unnecessary to resolve the question at this time. CU, *et al.*, file this brief, however, because a decision that Internet access over cable infrastructure is a "cable service" would imperil the open and competitive characteristic of the Internet which entitles it to the highest First Amendment protection.

Because significant importance will attach to any decision defining the regulatory status of cable-delivered Internet service, citizen *amici* address this brief exclusively to the legal questions which will arise if this Court upholds the Eleventh

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two U.S. Courts of Appeals that have considered this question, *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000); *MediaOne Group, Inc. v. County of Henrico*, No. 00-1680 (L) (4th Cir. oral argument held Sept. 27, 2000), and filed in several merger and regulatory proceedings before the FCC, including its review of AT&T's purchase of TCI, Inc., *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from TCI to AT&T*, 14 FCC Rcd. 3160 (1999), and of MediaOne, *Application of Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd. 9816 (2000), and the AOL/Time Warner merger, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, CS Docket No. 00-30, FCC 01-12 (rel. Jan 22, 2001) [hereinafter *"AOL/Time Warner Order"*].

Circuit's determination that, to benefit from Section 224 of the Communications Act of 1934, codified at 47 U.S.C. §§ 153 *et seq.* [hereinafter "the Act"], 47 U.S.C. § 224, a service offering must be either a "cable service" or a "telecommunications service." *Gulf Power v. FCC*, 208 F.3d 1263 at 1276 (11th Cir. 2000); Gov't Pet. App. at 27a.[3]

If this Court determines that it is inappropriate to remand this matter and require the FCC to consider and resolve the status of cable-delivered Internet service, citizen *amici* here demonstrate why Internet service delivered over cable infrastructure is not a "cable service" as that term is used in the Act. In addition, citizen *amici* explain that a decision to the contrary will endanger the free and open character of the Internet, thus implicating First Amendment principles.

In the interest of avoiding repetition, citizen *amici* endorse the analysis of *amicus curiae* Earthlink, Inc., that Internet service delivered via cable infrastructure includes within it a "telecommunications service."

SUMMARY OF ARGUMENT

First, CU, *et al.*, demonstrate, through detailed textual analysis of the statute, that Internet access offered via cable television infrastructure does not meet the definition of "cable service" under the Communications Act.

Specifically, under the statute, "cable service" must be "one-way." As the U.S. Court of Appeals for the Ninth Circuit found, Internet access is highly interactive, and cannot be

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[3] All references to the record below are to the Government's Appendix to its Petition for *Certiorari*, Docket 00-843.

described as "one-way." In addition, to be a "cable service," Internet access must fall within the definition of either "video programming" or "other programming service." It is neither. The FCC squarely held that cable-delivered Internet access does not meet the definition of "video programming."

More important, the definition of "other programming service" requires provision of information to "all subscribers generally." But a cable operator makes available to "all subscribers generally" only the infinitesimal portion of total Internet content that it produces and publishes on its own web pages, home page, or through licensing agreements. Furthermore, one cannot plausibly classify as a "cable service" any service that "makes available" Internet content by providing a communications link alone. To do so would subsume all communications links within the definition, including basic telephone service.

The 1996 amendments to the definition of "cable service" do not alter this result. These amendments added two words—"or use"—to modify the limited subscriber interaction included within the definition of "cable service." These words do not modify the mandatory requirement that "cable service" be "one-way" and be "video programming" or "other programming." Nor can a single line of legislative history expand the impact of that amendment beyond its plain meaning.

Second, CU, *et al.*, elaborate on the important characteristics of the Internet that imbue it with great value, and with full First Amendment protection. CU, *et al.*, describe the impact of allowing cable operators to offer Internet access under regulations that apply to "cable service." In short, cable operators will have the incentive and the technical capability to limit subscribers' ability to reach certain content via the Internet. This discrimination may be subtle, and thus virtually undetect-

able by the user. Citizens and consumers will no longer receive the benefit of the open and participatory form of communication this Court described, and protected, in *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

ARGUMENT

I. Internet Access is Not a "Cable Service" as Defined by the Act.

Claims that Internet access delivered via cable television infrastructure is a "cable service" directly conflict with the language of the Act.

Section 602(6) of the Act defines "cable service" as follows:

> (A) the *one-way* transmission to subscribers of (i) video programming, or (ii) other programming service, and
>
> (B) subscriber interaction, if any, which is required for the *selection or use of such video programming or other programming service.*

47 U.S.C. § 522(6) (emphases added). Internet access fails to meet this definition because it is not a "one-way transmission." Moreover, it is not "video programming" or "other programming." Finally, as the Eleventh Circuit correctly determined, Congress' addition of the words "or use" in 1996 to modify the term "subscriber interaction" did not override the basic definition of "cable service." *Gulf Power*, 208 F.3d at 1276-77; Gov't Pet. App. at 27a-29a.

A. Internet Access is Not a "One-Way" Transmission.

The first mandatory characteristic of a "cable service" is that it must be a "*one-way* transmission to subscribers." 47 U.S.C. § 522(6) (emphasis added).[4] *See AT&T v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000) ("the essence of cable service ... is one-way transmission of programming generally to subscribers.")

Internet access does not consist solely, or even primarily, of a "one-way transmission." Indeed, as this Court found in *Reno v. ACLU*, the Internet is "the most participatory form of mass speech yet developed." 521 U.S. 844, 863, 117 S.Ct. 2329, 2340 (quoting 929 F.Supp. at 879). Through the Internet "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." 521 U.S. at 870, 117 S.Ct. at 2344.

Accordingly, when the U.S. Court of Appeals for the Ninth Circuit considered whether Internet access meets the definition of "cable service," it cogently explained that Internet access is not a one-way service:

> *Internet access is not one-way and general, but interactive and individual beyond the "subscriber interaction" contemplated by the statute.* Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and

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[4] Subpart (A) is mandatory because subpart (B) includes the qualifier "if any" to modify subscriber interaction. Therefore, the content in subpart (B) is optional. 47 U.S.C. § 522(6)(B).

> participating in live chat groups involve two-way communication and information exchange unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming. *And unlike transmission of a cable television signal, communications with a Web site involve a series of connections involving two-way information exchange and storage, even when a user views seemingly static content.*

AT&T v. City of Portland, 216 F.3d 871, 876-877 (9th Cir. 2000) (emphases added).[5]

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[5] The Eastern District of Virginia's conclusion that Internet access delivered over cable infrastructure constitutes a "cable service" is incorrect because it failed to take this fact into account. *MediaOne Group, Inc. v. County of Henrico*, 97 F.Supp. 712, 715 (E.D. Va. 2000) *appeal pending* No. 00-1680 (L) (4th Cir. oral argument held Sept. 27, 2000). The Eastern District found that the Internet access at issue in that case is a "high-speed, *interactive* modem service, a *two-way interactive* offering that includes ... connectivity between a cable operator and a subscriber, access to the Internet, *interactive content* and programming, menus, navigational aids, *electronic mail*, access to newsgroups, a web browser, hosting and other features." 97 F.Supp. at 713 (emphases added). Despite the fact that these features clearly violate the statute's one-way limitation, the District Court held in conclusory terms that the service fell within the definition of a "cable service." *Id.* at 715. Ironically, the Court also appeared to come to the self-contradictory conclusion that Internet access via cable infrastructure also includes a telecommunications component. *Id.* at 714.

Because it is not "one-way," Internet access cannot be a "cable service."

B. Internet Access Qualifies as Neither "Video Programming" Nor "Other Programming Service."

Even if one were to ignore the statute's "one-way" requirement, *see supra* n.4, Internet access does not fall within the definition of "video programming" or "other programming service."

The Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). The FCC squarely held that Internet access does not qualify as video programming. *Internet Ventures, Inc. and Internet On-Ramp, Inc., Memorandum Opinion and Order*, 15 FCC Rcd. 3247, 3253-54 (2000).

The Act defines "other programming service" as "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). The only information that a cable company "makes available to all subscribers generally" is whatever proprietary content it produces and publishes on its own web pages, home page, or through licensing agreements. No matter how extensive this offering may be, it is an infinitesimal fraction of the information available over the Internet. The vast majority of non-proprietary Internet content is chosen individually by the user. The cable operator does nothing to provide such individualized information "to all subscribers generally."

In short, providing a telecommunications *link* to information is not the same as providing the information itself.

Some cable operators have argued to the contrary, that merely providing access to the Internet makes information available "to all subscribers generally." Such a claim proves too much. As the FCC explained when it submitted an *amicus curiae* brief to the Ninth Circuit in *AT&T v. City of Portland*:[6] "*Under this broad statutory interpretation, however, 'other programming service' would arguably include any transmission capability that enables subscribers to select and receive information, including basic telephone service.*" *Amicus Curiae* Brief of the Federal Communications Commission at 23-24, *AT&T v. City of Portland*, 216 F. 3d 871 (9th Cir. filed Aug. 16, 1999) (No. 99-35609) (emphasis added).[7]

Moreover, review of the meaning of "other programming service" in context supports the conclusion that it does not include Internet access. As the Eleventh Circuit noted, the definition of "other programming service" has remained unchanged since it was first enacted. *Gulf Power*, 208 F.3d at 1277; Gov't Pet. App. at 29a. And extensive legislative history

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[6] Citizen *amici* do not suggest that this Court afford deference to this or any litigation positions of agency counsel, *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 473-74, 102 L.Ed.2d 493 (1988). Rather, CU, *et al.*, cite it as persuasive argument.

[7] Not only would obliterating the distinction between "cable service" and "telecommunications service" wreak havoc on the Act, but other changes made to the 1996 Act demonstrate an intent to maintain a distinction between the services. *See* Earl W. Comstock and John W. Butler, *Access Denied: The FCC's Failure to Implement Open Access to Cable As Required by the Telecommunications Act*, 8 CommLaw Conspectus 5, 19-21 (2000).

powerfully supports the conclusion that the term "cable service" did not include any interactive service that could now be considered a component of Internet access when it adopted the definition.[8]

C. The Addition of "Or Use" By the 1996 Act Does Not Fundamentally Change the Definition of "Cable Service."

The cable industry and an FCC staff report have hypothesized that Congress' insertion of the words "or use" into the definition of "cable service" in 1996, Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 149-151, somehow expanded that definition to cover Internet access. *See, e.g,* Comments of the National Cable Television Association in FCC GEN Docket 00-185, in FCC GEN Docket 00-185, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities* (filed Dec. 1, 2000) at 6-7; Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, Federal Communications Commission OPP Working Paper No.

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[8] The House Report accompanying the 1984 Cable Act extensively considered the outer limits of the term "cable service" as it related to interactive services. It stated: "services providing subscribers with the capacity to engage in transactions, or to store transform, forward, manipulate, or otherwise process information or data would not be cable services." H.R. Rep. No. 98-934, at 42-43 (1984). It explicitly excluded from "cable service" the following: "shop-at-home and bank-at-home services, electronic mail, one-way and two-way transmission [of] non-video data and information not offered to all subscribers, data processing, video conferencing, and all voice communications." *Id.* at 44.

30 at 82-83 (1998).[9]

This "or use" argument is without merit. As a matter of statutory construction, the textual analysis included above forecloses the possibility that Internet access is a "cable service" because it does not alter the requirements that a "cable service" be one-way and either meet the definition of "video programming" or "other programming service."

The "or use" language added in 1996 is found in subpart (B) of the statutory definition. Subpart (B) includes within the "cable service" definition "subscriber interaction, if any, which

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[9] Citizen *amici* note that both courts and parties considering this matter have often misunderstood the authority of Commission staff reports. *See, e.g., Comcast Cablevision of Broward County, Inc. v. Broward County, Florida*, 124 F.Supp.2d 685, 687-89 (S.D. Fla. 2000) *appeal pending* No. 00-16507-GG (11th Cir. docketed Dec. 13, 2000). Such reports are the opinion of the author or authors alone, are not based on agency regulation, ruling, or administrative practice, and thus do not merit *Chevron* deference. *See Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 473-74, 102 L.Ed.2d 493 (1988); *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1221 (D.C. Cir. 1998) ("*Chevron* deference is owed to the decisionmaker authorized to speak on behalf of the agency, not to each individual agency employee.") As stated in the disclaimer to the Esbin paper, "[t]he analyses and conclusions in the Working Paper Series are those of the authors and do not necessarily reflect the view of other members of the Office of Plans and Policy, other Commission Staff, or the Commission itself." Esbin at cover. They can, however, provide useful analysis in the same manner as law review articles, and are used for that purpose herein.

is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). Thus, "or use" explicitly modifies "such video programming or other programming service." And, as discussed above, these services are limited in subpart (A) to "one-way" transmissions.

Thus, the statutory text contemplates, and always contemplated, limited subscriber interaction with programming, but *only to utilize a one-way programming service*.[10] The amendment altered the acceptable *goal* of a subscriber when he

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[10] For example, when the definition was first adopted in 1984, the accompanying House Report specifically pointed to inclusion of electronic program guides for pay-per-view video services, but ruled out more complex interactivity, stating:

> The Committee intends that the interaction permitted in a "cable service" shall be that required for the retrieval of information from among a specific number of options or categories delineated by the cable operator or the programming service provider. Such options or categories must themselves be created by the cable operator or programming service provider and made generally available to all subscribers. By contrast, interaction that would enable a particular subscriber to engage in the off-premises creation and retrieval of a category of information would not fall under the definition of cable service.

H.R. Rep. No. 98-934, at 42-43 (1984).

or she interacts with video and other programming. The subscriber may now interact with cable programming to "use," as well as to "select," that programming. *Gulf Power*, 208 F.3d 1263, 1277; Gov't Pet. App. at 29a. But allowing a subscriber to *use* a one-way service, as well as to *select* a one-way service, does not transform a one-way service into an interactive one.

Because the statutory text is unavailing, proponents of this theory attempt to supersede it with a single, ambiguous sentence from the legislative history. This sentence states:

> The conferees intend the amendment to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services.

S. Conf. Rep. No. 104-230, at 169 (1996); H.R. Conf. Rep. No. 104-458, at 169 (1996).

This statement does not reflect a clear intent to expand the existing definition of "cable service" beyond its limit. It shows that under some circumstances subscriber interaction would qualify as a "cable service," however it does not show that *any* interaction between a subscriber and video or other programming, no matter how significant, is now included within the "cable service" definition. For example, a cable company could offer a video game channel that would allow a subscriber to download and play certain games, but that would provide no other access to the Internet or any other information. Such a service would likely fall under the new "cable service" definition, but not the previous one.

To the extent that the history reflects an intent beyond the change reflected in the text, it is impotent. The amendment

did not alter the fundamental components of "cable service," regardless of whether the conferees intended to do so.[11] Legislative history may not expand the text beyond its meaning. *Circuit City v. Adams*, No. 99-1379, slip. op at 12, 2001 WL 273205, at *9 (U.S. Mar. 21, 2001) (citing *Ratzlaf v. United States*, 510 U.S. 135, 147-48; 114 S.Ct. 655, 662; 126 L.Ed.2d 615 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear")).

Moreover, as the Eleventh Circuit found below, the legislative history reveals—if it reveals anything—that this change "was minor in both language and intent." *Gulf Power*, 208 F.3d at 1276; Gov't Pet. App. at 28a. The legislative history does not support "a major statutory shift" or a "radical[] expan[sion]" of the definition "from a video base to an all-interactive-services base." *Id.* at 1276-77; *see also Whitman v. American Trucking Ass'n, Inc.*, No. 99-1257, slip. op. at 7, 121 S.Ct. 903, 910 (U.S. Feb. 27, 2001) (Congress "does not ... hide elephants in mouseholes").

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[11] As explained in notes 8 and 10, *supra*, as of 1984 "cable service" clearly did not include fully interactive functionalities. Because the prior definition is clear, and because the change in 1996 is so small, and does not alter the term "subscriber interaction," the minor change in 1996 reinforces the conclusion that "cable services" do not include Internet access.

II. Regulating Internet Access as a "Cable Service" Will Endanger the Internet's First Amendment Protection.

A. The Value of the Internet, and the Source of its First Amendment Protection, Lies in Its Freewheeling, Open Nature.

The Internet is a unique tool in the history of communication: it allows users a virtually unlimited ability to both produce and receive speech. As such, it receives the highest First Amendment protection. *Reno v. ACLU*, 521 U.S. 844, 870, 117 S.Ct. 2329, 2344. These characteristics distinguish the Internet from other media that the government may regulate more intrusively. *Id.*, 521 U.S. at 868-69, 117 S.Ct. at 2343. As this Court observed, "[n]o single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web." *Id.*, 521 U.S. at 853, 117 S.Ct. at 2336.

Because the Internet is "open, decentralized and competitive" it also serves consumers and promotes entrepreneurship:

> Companies ... can develop and distribute innovative applications that spur usage, without owning any network infrastructure. Service providers must continually offer better pricing, services and support to win users' business.

Kevin Werbach, *The Architecture of the Internet 2.0*, Release 1.0 (Feb. 19, 1999), at 1.

The Internet's signal characteristic has been open entry. Openness lowers entry barriers and facilitates instant access to

both the marketplace of ideas and of commerce. This network of networks also creates communities of common concern, locally and internationally.

Openness, however, is a product of legal and technical choices. It is not "natural" or immutable. Lawrence Lessig, *Code and Other Laws of CyberSpace* 6 (Basic Books 1999) ("We can build, or architect, or code cyberspace to protect values that we believe are fundamental, or we can build, or architect, or code cyberspace to allow those values to disappear."). As described below, if Internet access via cable infrastructure is regulated as a "cable service," the defining characteristics of the Internet will be lost.

B. If Internet Access is Classified as a "Cable Service," Cable Operators Could Legally Exercise Control Over Internet Content.

The openness and diversity of the Internet evaluated in *Reno* is largely the result of the legal and regulatory framework governing the networks over which it flowed. That Internet was almost exclusively accessed via telephone lines, which are regulated under the common carriage portions of the Communications Act. The Act requires common carriers to serve all customers on a nondiscriminatory basis. 47 U.S.C. §§ 201, 202. Common carriers may not control or alter the content carried over their infrastructure. 47 U.S.C. § 153(43); Jason Oxman, *The FCC and the Unregulation of the Internet*, Federal Communications Commission OPP Working Paper No. 31 at 10 (1999). The FCC explicitly maintained these obligations on telecommunications providers, even as it "unregulated" the data processing industry whose content flowed over the network. Oxman at 9-11.

Maintaining the open and nondiscriminatory nature of

networks that transmit Internet data is essential for preserving First Amendment values. The U.S. District Court for the District of Columbia found just such a connection when it considered the FCC's rules "unregulating" data processors. *United States v. Western Electric Co., Inc.*, 673 F.Supp. 525 (D.D.C. 1987) (Greene, J.). The Court concluded that "[c]ontrol by one entity of both the content of information and the means of its transmission raises an obvious problem" that would "enable [the network provider] to disadvantage and discriminate against rival[s]" and "thus to pose a substantial threat to the First Amendment diversity principle." *Id.* at 586. *See also United States v. AT&T*, 552 F.Supp. 131, 184-85 (D.D.C. 1982) *aff'd sub nom Maryland v. United States*, 460 U.S. 1001 (1983); Ithiel de Sola Pool, *Technologies of Freedom* 106 (Harvard University Press 1983) (the nondiscrimination obligation of common carriers is a central element to civil liberty, analogous to First Amendment protection).

The cable television model is very different. While government may, under some circumstances, regulate cable television operators' editorial decisions, *see Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); *see also Denver Area Educ. Telcom. Consortium v. FCC*, 518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996), they generally retain full power to determine what does—and does not—appear on video channels they control, 47 U.S.C. § 541(c). As a result, Congress has found it necessary to inject diversity into cable TV service offerings, *inter alia*, to assure that political candidates obtain "equal opportunities" to respond to political appearances, 47 U.S.C. §§ 315(c)(1)(A)-(B); to insure carriage of over-the-air TV stations, 47 U.S.C. §§ 534-35, and to reserve channel capacity for "leased" and "PEG" access, 47 U.S.C. §§ 531-32.

C. Technology Capable of Subtly Controlling Internet Content Is Available to Cable Operators, and Cable Operators are Likely to Deploy It.

New developments in network management technology permit cable operators to favor the content and technology of their business partners. Cable operators have a clear financial incentive to take advantage of this technology.

Cable companies will be able to discriminate against competing content. For example, Cisco Systems, the leading Internet hardware supplier, promises cable operators "absolute control" over content delivery, *see Controlling Your Network—A Must for Cable Operators* at 3 (Cisco Systems 1999). Cisco's promotional materials advise operators that it can apply technological controls to restrict, slow down and/or redirect incoming data and as well as subscribers' outgoing messages. *Id.* at 5. It also stated, "[a]t the same time you could promote and offer your own or partner's services with full-speed features to encourage adoption of your services ...." *Id.*

This technology is subtle and precise. It can:

> ...isolate network traffic by the *type of application*, even down to *specific brands*, by the interface used, *by the user type and individual user* identification, or by the *site address*.

Id. (emphases added).[12]

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[12] The technology described above is only one of the many ways in which the characteristics of the Internet celebrated in *Reno* may be fundamentally altered. For a discussion

The danger that this technology will be used to limit expressive speech and competition on the Internet is not hypothetical. For example, cable executives often describe their vision of these service offerings as "walled gardens" that will keep customers within a confined area of the Internet. While in these gardens:

> customers ... will be able to venture into the vast world of the Internet, but will likely have to work at it .... They will be encouraged instead to stay within the offerings they are presented, [by] companies that have cut deals for eyeballs [advertising customers] with AT&T.

Rebecca Cantwell and Mindy Charski, *An Octopus' Garden*, Interactive Week, Dec. 11, 2000, at 30.

In the view of John Malone, a Director of AT&T and its single largest shareholder, "[t]he big question is, who owns the customer. .... In a cablecentric world, the cable operator is the retailer, and everyone else is a wholesaler to the cable operators." *Id.*; *see also* Kenneth Auletta, *How the AT&T Deal Will Help John Malone Get Into Your House*, The New Yorker, Jul. 13, 1998, at 13.

The FCC has confirmed the dangerous implications of the combination of technological capability and financial incen-

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of other technologies used to discriminate against Internet content via cable infrastructure, *see* Brief for *Amici Curiae* Virginia Citizens Consumer Council, *et al.*, *MediaOne Group, Inc. v. County of Henrico,* No.00-1680 (L) (4th Cir. filed July 10, 2000) available at http://www.mediaaccess.org/filings/index.html#henricobrief.

tive in its review of the AOL/Time Warner merger and prohibited the merged entity from discriminatory conduct. Specifically, the FCC found the merged entity would have the incentive to discriminate against other ISPs, and that technologically it would be able to "limit the online features and functionalities of unaffiliated ISPs or ... degrade their quality of service, conceivably in ways that would escape easy detection." *AOL/Time Warner Merger Order* at ¶¶ 86, 87.[13]

Although it refused to address the question of whether Internet access via cable infrastructure is a "cable service," the Commission imposed a series of conditions on the AOL/Time Warner merger to prevent it from leveraging its power over Internet content, including prohibitions on technical discrimination against competing ISPs and on contractual limits on content provided by other ISPs. *Id.* at ¶ 126.

If the cable television model is successfully deployed, a cable line and a computer will not be enough to become a full participant on the Internet. Instead, a contractual agreement with the cable infrastructure owner, typically involving a significant financial exchange, will be a necessary precondition to receiving the full attention of other users seeking information.

The regulatory environment in which these services and technologies will be developed will determine whether the Internet maintains its capacity to transmit vibrant, open discourse, or whether it will be transformed into a closed and controlled private shopping mall where individuals may under-

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[13] The capabilities described in the Cisco paper, and other similar technological capabilities, formed a basis for the record in the FCC's review of the AOL/Time Warner merger. *AOL/Time Warner Order* at n.275.

take activities that further the goals of its financial backers, but may not engage in the vigorous debate that provides the foundation for this country's democratic principles.

CONCLUSION

If this Court's analysis of Section 224 requires it to reach the question, citizen *amici* request this Court to determine that Internet access delivered via cable television infrastructure is not a "cable service." Under that circumstance, citizen *amici* endorse the analysis of *amicus curiae* Earthlink, Inc., concluding that Internet access necessarily includes a telecommunications service. CU, *et al.*, encourage this Court to adopt that analysis, or, remand this question to the FCC and require the agency to consider and resolve the question.

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